DOCUMENT RESUME

ED 228 703 EA 015 551

AUTHOR Turner, William Lloyd
TITLE "Kentucky v. Rudasill": Another Blow to State Regulation of Nonpublic Schools.
PUB DATE 24 Feb 81
NOTE 21p.; Faculty Lecture presented at Union College (Barbourville, KY, February 24, 1981).
PUB TYPE Speeches/Conference Papers (150) -- Legal/Legislative/Regulatory Materials (090) -- Viewpoints (120)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS *Court Litigation; Elementary Secondary Education; *Parochial Schools; *Private Education; Religion; State Church Separation; State Courts; *State Standards; Teacher Certification; Textbook Standards
IDENTIFIERS *Kentucky v Rudasill; *State Regulation

ABSTRACT

"Kentucky v. Rudasill" involves state regulation of 22 Christian schools recently established by fundamentalist churches. The schools used the "Accelerated Christian Education" curriculum; the Kentucky Department of Education refused them accreditation because they did not use state-approved textbooks or state-certified teachers. The schools sued, claiming that churches have a right to operate schools free of state regulation. After a circuit court decision favoring the schools, the Kentucky Supreme Court ruled the state could enforce fire, health, and safety regulations and some standardized testing requirements, but could not require use of state-approved teachers and textbooks. The U.S. Supreme Court, without comment, refused to review the decision. "Kentucky v. Rudasill" is one of many recent court and government actions regarding public regulation of nonpublic schools, involving state court decisions, tuition tax credits, and tax exemptions for racially discriminatory schools. The Kentucky decision is different because it forbids state regulation of nonpublic schools beyond certain limits. The decision may apply only to Kentucky, but among its implications are that education may not be a "compelling state interest," definitions of "religion" may become problematic, and it is still unclear whether states may regulate nonpublic education (RW)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED228703

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

This document has been reproduced as received from the person or organization originating it.
Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY
William Lloyd Turner
TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

KENTUCKY V. RUDASILL:
ANOTHER BLOW TO STATE REGULATION OF NONPUBLIC SCHOOLS

William Lloyd Turner
Assistant Professor
of Education

Faculty Lecture
presented at
Union College
Barbourville, Kentucky
February 24, 1981

EA 015 551

On May 14, 1980, the United States Supreme Court refused, without comment, to review the decision of the Kentucky Supreme Court in the case Kentucky v. Rudasill.[1] The decision which has thus been allowed to stand could have wide implications for the future of education, both public and private, in the United States. The purpose of this paper is to review the events leading up to this decision, to outline the legal history of the case, and to discuss the broader meaning and possible implications for education in this country.

BACKGROUND OF THE CASE

The subject of this litigation was a group of twenty-two "Christian" schools in Kentucky, which were operated by fundamentalist churches, and which had not received accreditation from the Kentucky Department of Education, as required by state statute.[2] The suit was also joined by the Kentucky Association of Christian Schools, as a class-action suit, on behalf of all "Christian" schools in the state.

While most states exercise little or no regulation of nonpublic education,[3] the state of Kentucky differs in that it has required that the same standards by met by nonpublic elementary and secondary schools as are met by public institutions. Until the 1970's, the only extensive systems of nonpublic schools in Kentucky were those operated by the Roman Catholic Church and by the Lutheran Church-Missouri Synod. These schools had applied for and received accreditation by the Kentucky

1

Department of Education, and had enjoyed a harmonious working relationship with officials of the Department.

During the 1970's, several dozen new "Christian" schools, operated by fundamentalist churches, were established in Kentucky. Although their most spectacular growth occurred in the Louisville area after the implementation of forced bussing in the fall of 1975, "Christian" schools also appeared in other areas throughout the state where bussing was not a factor. A 1979 study found that these schools were attended primarily by children from the sponsoring churches, and could not be considered a direct result of the anti-bussing sentiment.[4]

While the majority of these new "Christian" schools sought and received state approval, a number of the smaller schools were unable to do so. These schools had adopted a curriculum known as "Accelerated Christian Education" (A.C.E.), which had not been approved by the Kentucky Department of Education, and thus were denied accreditation on the grounds that they were using textbooks which were not state-approved. After an initial period of indecision, the state Department of Education moved to take action against these schools. The Jefferson County School District (Louisville), where one of these schools was located, instituted truancy proceedings against the parents of Metropolitan Christian School, charging them with violation of the state's compulsory attendance law by failing to enroll their children in a properly accredited school.

When most other school districts involved declined to take similar action, the Kentucky Attorney-General issued a statement warning that local school authorities could be held legally responsible for failure to enforce the compulsory attendance law.[5]

At this point the twenty-two schools involved retained an attorney - Mr. William Ball, of Harrisburg, Pennsylvania, who had successfully defended fundamentalist schools in Ohio, Wisconsin, and several other states - and secured an injunction to prevent the enforcement of the compulsory attendance law against them. They also filed suit in Kentucky District Court, alleging that the right of churches to operate schools free of interference by the state Department of Education was a freedom guaranteed by the free exercise clause of the First Amendment.[6] In this action, they were joined by the Kentucky Association of Christian Schools on behalf of all other "Christian" schools in the state. The Association feared that if the state were successful in closing these twenty-two schools, similar action might follow against other Christian schools in Kentucky, if they could be found in technical non-compliance with any section of the accreditation standards.

The case was argued before Judge Henry Meigs of the Franklin Circuit Court in July, 1978, and a decision favoring the Christian schools was rendered on October 4, 1978.

In ruling for the Christian schools, Judge Meigs said:
"...the regulatory scheme fashioned by the state board, and sought by it to be imposed on these plaintiff schools under the dubious authority of 'approval' is far beyond Constitutional limits of legislative delegation...

"The evidence in this case fails to demonstrate more than a scintilla of 'colorable state interest' subserved by any exercise thereof in respect of these plaintiffs as against the latter's right to the free exercise and expression of religion...the overwhelmnig weight of substantial, probative evidence conclusively shows the state's efforts to be but poorly conceived, ill-defined, and quite direct interference with the plaintiffs' religious liberty...

"Their incontrovertible proof shows - and the demeanor of the witnesses confirms - irreconcilable differences between their educational concepts, notions of textbook and curriculum content and teacher qualification. These differences are not fanciful or arbitrary, but very real and substantial, having foundation in firmly held religious belief... Expert testimony in this case certainly established that there is not the slightest connection between teacher certification and ehhanced educational quality in state schools, nor is there generally any such requirement in private schools.

"In the face of truancy charges leveled by the state what is shown by these plaintiffs - with a clarity sometimes approaching

radience, compared with the turgid rhetoric of the state's 'Standards for Accrediting Kentucky Schools' and other publications - is a sober and devout belief that their religious faith should and does pervade every aspect of their lives, their churches, and their schools.

"By its intrusion upon plaintiff's (sic) protected right to free religious belief in their schools the state has crossed the First Amendment line which forbids either advancing or inhibiting religion...

"The state is unable to demonstrate that its regulatory scheme applied to the public (emphasis in the original) schools has any reasonable relationship to the supposed objective of advancing educational quality...Plaintiffs, on the other hand, have shown that without the benefit of the state's ministrations their educational product is at least equal to if not somewhat better than that of the public schools, in purely secular competence."[7]

The state was accordingly permanently enjoined from enforcing truancy laws against the Christian schools. This ruling was appealed by the Kentucky Board of Education to the Kentucky Supreme Court. On October 9, 1979, the Kentucky Supreme Court issued a decision affirming in part and reversing in part the decision of the Franklin Circuit Court.[8] While the Court upheld the right of the state to require compliance by Christian schools with health, fire and safety requirements

(from which the Christian schools had not sought exemption), and the state's right to administer standardized tests to assure a certain minimum quality of education, the court ruled that the state could not enforce any other minimum standards - specifically the use of state-approved textbooks, and state-certified teachers - upon the Christian schools. The court ruled that to do so would violate the provision of the Kentucky Constitution which states: "...nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed;..."[9]

Since the Franklin Circuit Court had made no reference to this section of the Kentucky Constitution, the action of the Kentucky Supreme Court in basing its ruling on this obscure passage in the state Constitution, rather than of the First Amendment to the federal Constitution, was seen by many observers as an attempt to remove the case from the jurisdiction of the federal courts.

The Kentucky State Board for Elementary and Secondary Education entered a direct appeal to the United States Supreme Court, citing compelling state interest, and alleged inconsistencies with past interpretations of the section in question; they also alleged that the children who were the subjects of the action were being denied their right to equal protection of the law, as guaranteed by the Fourteenth Amendment to the United States Constitution.[10] On May 14, 1980, the United States Supreme Court refused without comment to review the decision.

This decision is but the latest in a series of legal moves which have occurred over the last decade, challenging the right of the state to regulate fundamentalist schools. The right of religious groups to operate nonpublic schools was first set forth by the Supreme Court of the United States in 1925 in the case Pierce v. Society of Sisters,[11] and for almost half a century thereafter this right was not seriously challenged. However, the rapid growth of fundamentalist Protestant schools over the last decade has produced renewed litigation in the area. Unlike the Roman Catholic and Lutheran schools, which have generally cooperated with state authorities, many fundamentalist churches have challenged the right of state departments of education to regulate their schools. On the other hand, some school districts, fearing a possible loss of revenue to these schools, have sought to use their regulatory authority as a means to discourage the formation of new nonpublic schools.

The first of the new wave of court decisions relating to nonpublic schools came in 1972, in the case Wisconsin v. Yoder.[12] In this case, the Supreme Court attempted to resolve the dispute which had been going on for a number of years concerning the right of the Amish - a conservative branch of the Mennonite Church - to educate their children only through grade eight. This case is signifigant to the present study because in it the Supreme Court for the first time allowed an exception to state compulsory attendance statutes on the basis of religion.

Although the court took pains to state that the exemption applied only to the Amish, it clearly had broader implications, and has been cited as precedent in all of the subsequent cases involving Christian schools.

A second case involving the right of fundamentalist churches to operate schools free from state control came in the state of Ohio in 1976. In this case, Ohio v. Whisner,[13] the Ohio Supreme Court, citing Yoder as precedent, ruled that an exemption to state regulation based on religious grounds, might be extended to other fundamentalist groups (in this case, Independent Christian Churches.) This right was reaffirmed by the Vermont Supreme Court in the ruling Vermont v. LeBarge[14] in the same year.

A ruling in North Carolina in 1978 was less clear-cut. In this case, State of North Carolina v. Columbus Christian Academy,[15] Christian schools in that state sought exemption from the state's regulation on religious grounds. In this instance, the court struck down the course of study mandated by the State Board of Education, but left intact the Board's authority to approve a new course of study; rather than strike down the law, as in the Ohio case, the court undertook to leave the law intact and supply the limitations. The court prohibited State Board control of textbooks, administration, libraries, number of teachers, fire, health and safety, materials of instruction, and the "letter of non-standard rating" which the state had issued as a credential. However, the Court left intact the authority of the State Board to certify principals

and teachers, set a minimum course of study for nonpublic schools, and added: "Nothing herein shall prohibit the State Board of Education from adopting rules and regulations governing nonpublic schools which are in conformity with this judgement." Not surprisingly, the ruling pleased neither side; but it was interpreted in some quarters as at least a partial victory for the State Board. However, before the State Board could establish new standards (which would then presumably have been tested in the courts) the North Carolina legislature resolved the issue by enacting (1979)[16] legislation which removed not only "Christian" schools, but all other "non-tax-supported schools" as well from state jurisdiction. Thus the eventual result in North Carolina was a clear victory for "Christian" and other nonpublic schools.

Another attempt to regulate nonpublic schools, this time at the Federal level, came in the fall of 1978. In August, 1978, the Internal Revenue Service announced guidelines for determining whether "Christian" schools and other nonpublic schools were racially discriminatory.[17] While the proposed guidelines had numerous provisions, they generally stated that nonpublic schools suspected of being racially discriminatory must prove their willingness to accept minority students by such things as the granting of scholarships to minority students, the recruitment of minority students, increasing enrollments of minority students, employing minority teachers or staff, including minority members on their school board, etc. Schools which failed to do so would lose their tax-exempt status.

The announcement of these regulations produced an outcry from "Christian" and other nonpublic schools, and an unprecedented volume of mail on the subject to the Internal Revenue Service.[18] Confronted with rising opposition to its proposal, the Internal Revenue Service, which had initially attempted to treat the guidelines as a purely "procedural" matter and thus bypass the required public hearings, scheduled hearings, and subsequently announced a slightly revised set of guidelines.[19] Before the guidelines could be put into effect, however, Congress attached an amendment to the Internal Revenue Service appropriation bill which prohibited the Internal Revenue Service from taking any further action in the matter during the fiscal year covered by the appropriation. The Internal Revenue Service subsequently filed suit in federal court to prevent enforcement of this prohibition. Following a favorable ruling from the court, the Internal Revenue Service proceeded with its plan to remove the tax exemption of schools not in compliance with its guidelines. The Reagan administration, however, has declared its opposition to this regulatory scheme, and the issue remains unresolved at this writing.[21]

Another effort which is currently underway to enact legislation favorable to nonpublic education, and should be noted at this juncture, is the so-called "tuition tax credit" plan, introduced into Congress by Rep. Packwood (Rep., Oregon), and Sen. Moynihan (Dem., New York).[22] Differing versions of this bill, which would have provided up to five hundred dollars in tax credits for

parents having students in nonpublic schools, were enacted by the House of Representatives and by the Senate in 1978. Although Congress failed to agree on an acceptable compromise, the 1980 Republican platform pledged support for such a measure, and the issue seems certain to surface again in the current session of Congress.

Yet another effort which is currently underway to extend some degree of governmental regulation over nonpublic education is the effort now being made to bring church-operated schools under the Unemployment Act.[23] This effort is also being challenged in court by various Christian school groups as a violation of their freedom of religious exercise, and an attempt to levy a tax on a church, which is prohibited by the terms of the law.

All of these issues are evidence of a new political activism among conservative Protestant groups.[24] Against this background of a series of victories for Christian schools, the Kentucky case must be seen as yet another victory for the advocates of Christian education. This ruling differs from earlier rulings, and goes beyond them, in the following respects:

The earlier rulings involving Christian schools[25] all found specific state regulations to be overly broad or unclear, and invalidated them on those grounds, without considering the question of whether the state has a right to regulate nonpublic schools (although the North Carolina court implied

that the state might do so if a suitable set of regulations could be written.) The Kentucky ruling, on the other hand, deals with the right of the state to impose regulation of any kind upon Christian schools. What the Court decreed in this case is that the state may regulate health, fire, and safety standards, and by means of standardized tests may ascertain whether students are sufficiently literate to exercise their franchaise as voters; but that beyond this, the state may not go.

This ruling raises several points:

1. The first and most obvious question raised by the ruling is where a standardized test is to be found which will satisfy all parties as a measure of a school's performance. It is easy to envision how the implementation of this provision of the ruling could produce almost endless litigation. However, since nonpublic schools have historically scored higher on standardized insturments than public schools,[26] the implementation of such a program would seem most likely to benefit nonpublic schools, and prove detrimental to public schools.
2. It is equally clear that since this ruling was based on an obscure clause of the Kentucky Constitution, it will not automatically create precedent for other states which have no such provisions in their Constitutions.
3. However, since the state was seeking reversal from the United States Supreme Court on the grounds of "compelling state interest," and the Court declined to review the case

the implication is that the Court does not consider education to be a "compelling state interest" - at least not at this time.

Where does the right of the state to regulate religious schools stand, in the aftermath of the Rudasill decision? While the issue has not been definitively resolved, a number of points are clear:

1. While education may not be viewed by the Court as a "compelling state interest," desegregation might well be, and the issue of Internal Revenue Service regulations remains unresolved.

2. The right of a state to enact legislation exempting church-operated schools from state regulation has now been clearly established (or, as is the case in most states, the right to enact no legislation at all on the subject.) The Kentucky Supreme Court ruled that this is what Kentuckians had done in their state Constitution. The United States Supreme Court upheld the state's right to enact such legislation, ruling in effect that there was no inherent right or compelling state interest which required the state to regulate religious schools.

3. Still unclear, however, is the question to what extent a state may Constitutionally regulate church-operated schools, if empowered to do so by the state legislature; and to what extent the operation of church-affiliated schools constitutes a part of the "free exercise of religion", and is thus protected from state regulation by the First Amendment.[27]

4. This raises the question, which is basic to a resolution of the matter, of how "religion" should be properly defined, in the constitutional sense. If "religion," in a First Amendment sense, means only Sunday morning worship activities, then schools are not covered by First Amendment guarantees, and may be regulated, if the state chooses to do so.[28] If, on the other hand, the practice of "religion" includes the operation of printing plants (for church literature), wineries (for communion wine), hospitals, nursing homes, children's homes, annuity programs for retired ministers, and so on, then these activities are constitutionally protected from state regulation, and may not be so regulated. This basic question - of what constitutes "religion" in the meaning of the First Amendment - remains unresolved, and the issue of state regulation of "Christian" schools cannot be laid to rest until such a definition is forthcoming from the courts.

It is clear, however, that these rulings and legislative actions, taken as a whole, indicate a trend toward less regulation of religious schools. In each of the states where the issue has been contested, the result has been a clear victory for the Christian schools. The best the state boards of education have been able to do is to minimize the damage to their authority, and attempt to retian at least some measure of control over nonpublic education. The various state departments of education have attempted to convince the courts that education constitutes a "compelling state

interest," and therefore should take precedence over First Amendment guarantees. This the courts have thus far declined to hold, and in refusing to review the Kentucky case, which was based on this contention, the Court appears to have definitely rejected the argument that "compelling state interest" requires the regulation of religious schools.

In the light of the above, it seems clear that very little remains of the state's right to regulate religious schools in the United States. Most states have never attempted to regulate church-operated schools, and those few states which have attempted their regulation have one by one been forbidden to do so, either by court rulings or by legislative bodies. What the Christian schools have been unable to do thus far is to secure a definitive ruling from the United States Supreme Court which would exempt all religious schools from state regulation, based on the First Amendment guarantees of religious freedom. This has been their chief contention in each case, and in each case the Court has carefully avoided the issue, merely affirming or denying lower court decisions based on the content of specific state statutes. The landmark ruling sought by the Christian schools has not yet been forthcoming.

While the effort continues to reach such a resolution through the courts, the contest has moved to another arena. Sen. Laxalt (Rep., Nevada) has introduced legislation similar to that

enacted by the North Carolina legislature exempting Christian schools from federal regulation, into the United States Congress.[29] While this measure was not enacted by the last session of Congress, the election of a conservative majority to the current session of Congress, and the fact that the bill has been endorsed by President Reagan, would seem to enhance its chances of passage in the current session of Congress. The same is true of the tuition-tax credit plan.

Conservative groups - such as Moral Majority, Christian Voice, and The Roundtable - which claim to represent a total of between twenty-five and forty million voters, are lobbying for these measures. They appear to have had at least some influence on the outcome of the 1980 elections, and they are now attempting to consolidate their political base. They could well constitute a signifigant voting bloc in future elections.

Above all, it seems certain that we have not heard the last of the matter, and may expect more litigation and legislation in the months ahead. With a conservative tide apparently running in the country, still more victories may lie ahead for "Christian" education. While few expect fifty-one percent of the class of 1990 to graduate from "Christian" schools, as projected by one study,[30] still the establishment of a strong system of nonpublic Protestant schools, funded by tax credits and exempt from state regulation, could further weaken an already strained system of public education in the United States.

FOOTNOTES

1. 78 Ky. 642
2. K.R.S. 159.030(1)(b); K.R.S. 156.160(7).
3. Stolee, Michael J., "Nonpublic Schools: What Must They Teach?" School and Society, October 3, 1964, pp. 274-278.
4. Nordin, Virginia Davis, and William L. Turner, "More Than Segregation Academies: The Growing Protestant Fundamentalist Schools." Phi Delta Kappan, 61:391-394 (February, 1980).
5. Franklin Circuit Court, Div. I, C.A. No.88314, p.29a.
6. ibid. p.17a.
7. Ibid.
8. Kentucky State Board for Elementary and Secondary Education v. Rudasill, 78 Ky. 642.
9. Constitution of the Commonwealth of Kentucky, Section 5.
10. Petition for writ of certiorari to the Supreme Court of Kentucky, Ky.vRudasill, pp. 8-18.
11. 268 U.S. 510
12. 406 U.S. 205
13. 351 N.E.2d 750
14. 134 Vt. 276
15. C.A. No.78, C.V.S. 16/8 General Court of Justice, Superior Court Division, Wake County, North Carolina.
16. North Carolina General Statutes, chapter 505.
17. Internal Revenue Service, News Release IR-2027 (Washington: Government Printing Office, 1978); 43 FR 37296.

18. Billings, Robert J., "The I.R.S. Has Done It Again!" Christian School Alert (Washington, D.C., February, 1979), p. 1.
19. 44 FR 9451-9455
20. Garrett, James Leo, Jr., "Bureaucratic Governmental Regulations of Churches and Church Institutions," Journal of Church and State 21:2, Spring, 1979, 198.
21. Edwards, Deryl, "I.R.S. Invades 19 Schools," Moral Majority Report 1:13 (October 15, 1980), p. 4.
22. S. 21412
23. Turner, William L., Reasons For Enrollment In Religious Schools: A Case Study of Three Recently Established Fundamentalist Schools in Kentucky and Wisconsin. Unpublished doctoral dissertation, University of Wisconsin-Madison, 1979, pp. 69-70.
24. For a full discussion of this issue, see Phi Delta Kappan 61:608-615 (may, 1980).
25. Ohio v. Whisner, 351 N.E.2d; Vermont v. LeBarge, 134 Vt. 276; North Carolina v. Columbus Christian Academy, C.A. No.78,
26. C.V.S. 16/8, General Court of Justice, Superior Court Division, Wake County, North Carolina.
26. Doucette, John, and Robert St.Pierre, Anchor Test Study: School, Classroom, and Pupil Correlates of Fifth Grade Reading Achievement, National Center for Educational Statistics; Department of Health, Education, and Welfare, Washington, D.C., 1971: NCES-77-123, pp. 20-23.

27. In Board of Education v. Allen (392 U.S. 236) the Court states (at 246) that a state may require minimum hours of instruction, specify teacher training, and prescribe subjects - but does not designate what these subjects might be. The Court also says (in a footnote, at 246, footnote 7, citing a dissenting opinion in Minersville v. Gobitis 310 U.S. 586 at 604) that a state may req uire attendance at schools meeting state-imposed requirements, without stating how far these requirements may extend.
28. This is the definition used by most Soviet bloc countries, which guarantee religious freedom, but define religion so narrowly that many activities are thereby prohibited.
29. Ninety-sixth Congress, First Session, S.1808, H.R.6028, section 101(a), 301.
30. Falwell, Jerry, speech delivered to "I Love America" rally in Frankfort, Kentucky, October 15, 1979.